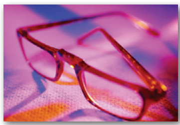

When a Client Shows Up as a Witness for the Other Side

A recent column in an American Bar Association[1] publication points out the ethical issues involved when an individual with whom you have a current lawyer–client relationship shows up as a nonparty witness for the other side in a case in which you are counsel for one of the litigants. The conflicting aspects are obvious: Do you pull your punches in favor of the client–witness at the expense of the client–litigant? How can you ethically attempt to impeach an existing client, if that is what is required, without breaching your duties of loyalty to him? What must you disclose to your client–litigant about the situation?

This column discusses a number of state ethics opinions on the subject, and includes a reference to ABA Formal Opinion 92-367 (Lawyer Examining a Client as an Adverse Witness, or Conducting Third Party Discovery of the Client, Oct. 16, 1992), an excellent treatment of the issues involved. If you are ever confronted with this kind of a situation, I suggest you read this opinion.

We start with the conflict of interest rules in ER 1.7 (Conflict of Interest: Current Clients),[2] which tell us that we can't represent a client if that representation will be directly adverse to another client (ER 1.7(a)(1)) or if there's a significant risk that the representation will be materially limited by our responsibilities to another client, a former client, or by our own personal interests (ER 1.7(a)(2)). So even if the witness you have to cross-examine is a former client, if your continuing obligations of confidentiality set forth in ER 1.9(c) conflict with your duties of competence and diligence to the client you are currently representing, or if you have a personal interest in trying to make sure that if that former client needs a lawyer a lawyer in the future she will call you, there may be a problem.

But ER 1.7 isn't the only ethical rule implicated. Cross-examination of a current or former client also may breach the client confidences protected by ER 1.6 (Confidentiality of Information), especially if you have specific confidential information about the client–witness that is relevant to the cross-examination. Do you risk over-compensating for the problem and pull your punches, thereby failing to competently and diligently represent your client–litigant?

Finally, the cross-examining lawyer must be aware of the obligations set forth in ER 1.8(b), which prohibits use of information by a lawyer of information relating to the representation of a client to the disadvantage of that client unless the client has given informed consent.[3] Be careful here: Just getting consent of the client–witness won't be enough to satisfy the consent obligations of ER 1.7, which requires the informed consent of both the client–witness and the client–litigant to relieve the conflict. And remember that if you are dealing with two current clients, there are going to be tensions between your duties of communication under ER 1.4 (Communication) in telling your clients enough so they can give their informed consent without violating the ER 1.6 confidences you must keep concerning each of them.

What can you do if you are confronted with a genuine conflict of interest between the litigant and the witness and you can't get both of them to consent?

The ABA opinion points out that the extent of the potential conflict in any given situation may depend on what it refers to as the "degree of adverseness." If the client–witness is an expert witness and your obligation to your client–litigant is to impeach the witness's credibility, you obviously have an ER 1.7 problem. On the other hand, if your cross-examination of the client–witness is simply to authenticate a document or confirm an uncontested signature, the consent of the clients involved shouldn't be a problem.

The ultimate question here is what can you do if you are confronted with a genuine conflict of interest between the litigant and the witness and you can't get both of them to consent to allow you to proceed? ER 1.10 (Imputation of Conflicts of Interest: General Rule) provides that if you are prohibited from representing a client by either ERs 1.7 or 1.9, then all other lawyers with whom you are "associated" in your law firm are prohibited from doing so too—which means you can't simply ask another lawyer in your office to cross-examine the client–witness for you.

—continued

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

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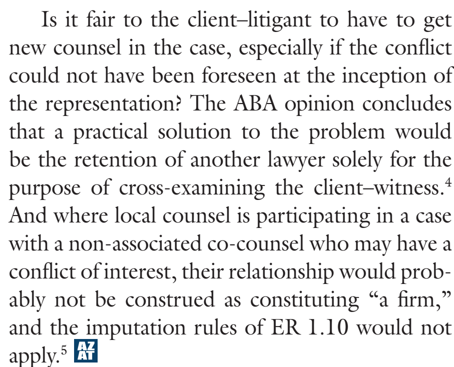

Is it fair to the client–litigant to have to get new counsel in the case, especially if the conflict could not have been foreseen at the inception of the representation? The ABA opinion concludes that a practical solution to the problem would be the retention of another lawyer solely for the purpose of cross-examining the client–witness.[4] And where local counsel is participating in a case with a non-associated co-counsel who may have a conflict of interest, their relationship would probably not be construed as constituting "a firm," and the imputation rules of ER 1.10 would not apply.[5]

endnotes

1. Peter Geraghty, *Conflicts of interest: Examining a current client as an adverse witness*, YOURABA (Sept. 2017), available at www.americanbar.org/publications/youraba/2017/september-2017/conflicts-of-interest--examining-a-current-client-as-an-adverse-.html
2. Rule 42, ARIZ.R.S.CT.
3. "Informed consent" is defined in ER 1.0(e) as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct".
4. This solution was suggested in *United States v. Jeffers*, 520 F.2d 1256, 1266 (7th Cir. 1975).
5. *See* ER 1.0(c) and Comments [2] and [4] following.